NO. 45996-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CLAUDE HUTCHINSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Ronald E. Culpepper, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

GLINSKI LAW FIRM PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Statutes

Constitutional Provisions

A. ASSIGNMENTS OF ERROR

1. The State failed to present sufficient evidence of communicating with a minor for immoral purposes.

2. The prosecutor committed serious misconduct by impugning the integrity of defense counsel.

3. The prosecutor's misstatement of the law regarding accomplice liability in closing argument constitutes prejudicial misconduct.

4. Prosecutorial misconduct denied appellant a fair trial.

Issues pertaining to assignments of error

1. Where there was no evidence that appellant communicated with a minor regarding an illegal sexual act, did the State fail to prove all the elements of communication with a minor for immoral purposes?

2. Did the prosecutor commit prejudicial misconduct when introducing evidence for the purpose of impugning defense counsel's integrity and misstating the law on accomplice liability in closing argument?

B. STATEMENT OF THE CASE

1. Procedural History

On October 5, 2012, the Pierce County Prosecuting Attorney charged appellant Claude Hutchinson with second degree rape and promoting commercial sexual abuse of a minor. CP 1-2; RCW 9A.44.050(1)(a); RCW 9.68A.101. On January 3, 2013, the State added charges of first degree robbery, first degree kidnapping, and communication with a minor for immoral purposes. CP 3-5; RCW 9A.56.200(1)(a)(ii); RCW 9A.40.020(1)(b); RCW 9.68A.090.

The case against Hutchinson and co-defendant Eugene Young proceeded to jury trial before the Honorable Ronald E. Culpepper. The jury found Hutchinson not guilty of robbery and kidnapping, guilty of the lesser included offense of attempted second degree theft, and guilty of the other counts. CP 162-67. The court imposed a standard range sentence, and Hutchinson filed this timely appeal. CP 197-200, 218.

2. Substantive Facts

CB met Eugene Young on September 25, 2012, at a bus stop in Renton. Claude Hutchinson was with Young at the time. 6RP[1] 250-51;

[1] The Verbatim Report of Proceedings is contained in 16 volumes, designated as follows: 1RP—5/21/13; 2RP—8/13/13; 3RP—10/2/13; 4RP—10/8/13; 5RP—12/3, 4, 5, 9/13; 6RP—12/10/13; 7RP—12/11/13; 8RP—12/12/13; 9RP—12/16/13; 10RP—12/17/13; 11RP—1/7/14; 12RP—1/8-9/14; 13RP—1/10/14; 14RP—1/13-14/14; 15RP—3/7/14; 16RP—3/13/14.

7RP 475. Although CB was 16 years old, she was in the habit of lying about her age, and she told Young she was 19. 6RP 258. Young and Hutchinson asked her to cash a check for them, and she agreed. 6RP 253, 255. CB deposited the $800 check in her account using an ATM and withdrew $100, which she gave to the men. 6RP 260. They all then walked to CB's house, and CB invited them inside. 6RP 261, 267. CB exchanged phone numbers with Young, and they agreed to meet the next day. 6RP 266, 268.

Young texted CB the next morning, saying he needed to get the rest of his money, and Young and Hutchinson met CB at her house in a taxi. 6RP 270-71. CB gave Young her debit card and PIN, and Young withdrew money from her account. 6RP 272-73. Young then suggested that CB could make money through prostitution. As with everything else Young suggested, CB readily agreed. 6RP 275. They headed to a motel in Fife. 6RP 279.

On the way to motel, they met NH at a train station. 6RP 279. NH was a 24 year old woman who had met Young and Hutchinson in June 2012. 8RP 706. She considered Young her boyfriend. 8RP 707. NH purchased some tequila and rented a room at the motel. 8RP 677-78.

Inside the motel room, Young took photographs of CB and NH in their underwear and created ads which he posted on Backpage.com. 6RP

283-86. Within 15 minutes CB started receiving text messages and calls in response to the ad. 6RP 310. NH gave CB advice about what to charge for various sex acts when she met with customers. 6RP 312. Over the next few days, CB committed ten to 15 acts of prostitution with customers responding to the ad. 6RP 315. According to CB, she gave the money she received for these acts to Young. 6RP 313; 7RP 427. During this time CB had conversations with Young by text message, phone call, and in person relating to prostitution. 6RP 318-21, 326. She was not communicating with Hutchinson, however. 6RP 326.

CB and NH shared one room in the motel which they both used for acts of prostitution. 6RP 330-31; 8RP 721-22. Young and Hutchinson stayed in another room at the motel, rented by Hutchinson. 6RP 316; 11RP 1074. When CB and NH were not with customers, they spent time in Young and Hutchinson's room, eating and hanging out. 6RP 333. NH testified that while she was in that room, Hutchinson slapped her repeatedly and forced her to have sex with him, Young, and another man. 8RP 694, 697. She left the room at times to meet with prostitution customers, and she returned to the room shared by the men. 8RP 696.

At some point when Young and Hutchinson were away from the motel, NH called her parents to pick her up, and she left. 8RP 715. She

maintained her relationship with Young after that and continued to talk to him regularly after his arrest. 8RP 718, 721; 9RP 742-43.

On September 28, 2012, CB was arrested at the Fife motel by officers investigating the Backpage.com ad. 6RP 329; 10RP 989-90, 992. She was released to her parents, but within a few days she voluntarily returned to Young. 6RP 335; 7RP 438, 477; 8RP 576. She committed additional acts of prostitution at a motel in SeaTac, until she was detained by undercover police officers on October 2, 2012, after agreeing to have sex with them for money. 7RP 459, 477; 11RP 1139, 1151. Young was arrested at the same motel, and Hutchinson was arrested in King County. 10RP 996; 11RP 1033.

On October 5, 2012, RE, who was 16 years old, went to the Kent police station and reported that she had been robbed by two men on September 18, 2012. 11RP 1085. RE said she was at a transit station when Hutchinson, whom she had never met, approached her. 9RP 842. RE said he walked her into a corner, telling her she was pretty and talking about performing oral sex on her. 9RP 844-45. She told him to back off and said she was just waiting for a bus. At that point, Young stepped forward and told Hutchinson to back off, and Hutchinson walked away. 9RP 846-47. When RE thanked Young for his help, Young told her he wanted her to cash a check for him in return. 9RP 847-48. RE claimed

that she refused at first and only changed her mind because Young lifted his shirt, showing what she thought was a gun. 9RP 848-49.

RE and Young walked from the transit station to the bank, with Hutchinson joining them as they walked. 9RP 849-50. She deposited a check Young gave her in an ATM and withdrew some cash, which she gave to Young. 9RP 853, 858. She and Young then went to another ATM, and RE withdrew some more cash. 9RP 858. She gave it to Young, and Young paid her $40. 10RP 873, 938.

Young entered his phone number into RE's phone, and the next day they communicated by text message. 10RP 874, 878. RE was willing to work with Young to make some fast money, believing she would be selling drugs. 10RP 910-11. When she received texts referring to sexual acts, she responded that she was 16 years old and not interested. 10RP 879, 934-36.

A few days later, RE learned that her bank account had been debited for the amount of the check she deposited for Young, and she contacted him about getting her money back. 10RP 877-78. They arranged to meet on September 25, but Young did not show up. 10RP 908-09. Eventually, RE's aunt and father learned about the money missing from RE's account, and to convince them that she did not use the

money to purchase drugs, she filed a report with the Kent police. 10RP 919, 923.

C. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION OF COMMUNICATION WITH MINOR FOR IMMORAL PURPOSES.

In every criminal prosecution, the State must prove all elements of a charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Therefore, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

Hutchinson was charged with communication with a minor for immoral purposes relating to his comments to RE at the transit center on September 18, 2012. CP 157. The charge was based on RCW 9.68A.090, which provides in relevant part that "a person who communicates with a minor for immoral purposes … is guilty of a gross misdemeanor." There

is no question that RE was a minor for the purpose of this offense, because she was under 18 years of age. See RCW 9.68A.011(5). And RE testified that Hutchinson spoke to her at the transit center. The issue is whether that communication was "for immoral purposes."

Washington courts have determined that "the statute prohibits communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." State v. McNallie, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993). It is not enough that the State prove communication of a sexual nature, however. The communication must be related to sexual misconduct. State v. Pietrzak, 100 Wn. App. 291, 295, 997 P.2d 947 (2000). The statute does not proscribe a person from communicating about immoral sexual conduct that would be legal if performed. State v. Luther, 65 Wn. App. 424, 427, 830 P.2d 674 (1992) (reversing conviction where 16 year old defendant asked 16 year old girl if she would perform fellatio, because the act would not be illegal if performed).

Here, RE testified that Hutchinson started telling her she was really pretty and talking about stuff he wanted to do to her. 9RP 845. When asked specifically what he said, RE testified that she did not remember the specific words, "but talking about performing oral sex on [her], stuff like that." 9RP 845. Because RE was 16 years old, it would not have been

illegal for Hutchinson to have sexual intercourse with her. There was no evidence at trial, and no contention that Hutchinson talked to RE about prostitution or any other illegal act of a sexual nature.

The parties seemed to be under the impression that any communication of a sexual nature with someone under the age of 18 would violate the statute. See 14RP 1432-33 (Prosecutor argued in closing that Hutchinson was guilty because he communicated in strong sexual overtones with a minor). This interpretation has been specifically rejected, however. See Luther, 64 Wn. App. at 427. The statute does not prohibit communicating about an act where it would be perfectly legal for the parties to participate in that act. Doing so would violate substantive due process. Luther, 65 Wn. App. at 427-28. Because the sexual act about which Hutchinson communicated with RE was not illegal, the State failed to prove that Hutchinson communicated with a minor for immoral purposes. His conviction must therefore be reversed.

2. PROSECUTORIAL MISCONDUCT DENIED HUTCHINSON A FAIR TRIAL.

The prosecutor, as an officer of the court, has a duty to see that the accused receives a fair trial. State v. Carlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper

methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Prosecutorial misconduct may deprive the defendant of a fair trial, and only a fair trial is a constitutional trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. V and XIV; Wash. Const. art. 1, § 3.

A defendant is deprived of a fair trial when there is a substantial likelihood that the prosecutor's misconduct affected the verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing Reed, 102 Wn.2d at 147-48). When the defendant establishes misconduct and resulting prejudice, reversal is required. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994).

The prosecutor committed misconduct in this case when he impugned the integrity of defense counsel while examining the State's key witness and misstated the law during closing argument.

a. The prosecutor impugned the integrity of defense counsel.

On cross examination, defense counsel asked CB about statements she had made during her defense interview, which were inconsistent with her testimony and with her other statements. 7RP 468-71, 507, 509-10;

8RP 554-56. Then, during redirect examination of CB, the prosecutor made a point of establishing that neither Hutchinson's attorney nor an investigator from her office was present at the defense interview. 8RP 571-72. Defense counsel objected, arguing that that information was not relevant, but the court overruled the objection. 8RP 572. When the prosecutor started asking CB about defense counsel's method of impeachment, counsel asked to take the issue up outside the jury's presence. 8RP 590-91. The jury was excused, and counsel moved for a mistrial. Counsel argued that there was no legitimate purpose for the prosecutor's questions about whether she had attended the defense interview and the line of questioning was intended simply to disparage counsel, suggesting her preparation was unsatisfactory and she did not care about Hutchinson's defense. 8RP 593-94, 600. The court denied the motion, finding the prosecutor was simply trying to establish who was present at the interview. 8RP 598.

It is serious misconduct for the prosecutor to disparage defense counsel's role or to impugn counsel's integrity. State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011); State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984); State v. Gonzales, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012 (2003). The state and federal constitutions guarantee an accused the right to counsel, and

comments by the prosecutor that permit the jury to nurture suspicions about defense counsel's integrity can violate this right. U.S. Const. amend. VI; Wash. Const. art. 1, § 22; Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983), cert. denied, 469 U.S. 920 (1984) . Implying that counsel is wrongfully trying to deceive the jury goes beyond the bounds of acceptable prosecutorial behavior. Thorgerson, 172 Wn.2d at 452.

As counsel argued below, the prosecutor impugned her integrity by drawing the jury's attention to the irrelevant fact of her absence from the defense interview, suggesting that counsel's preparation was lacking and she was not to be trusted. The prosecutor's focus on defense counsel's absence implied that defense counsel was being deceptive when confronting CB with her statements from that interview, because counsel was not even present to hear them.

While the court overruled defense counsel's objection to the line of questioning at the time it was made and denied counsel's motion for a mistrial, it offered to fashion some sort of curative instruction. 8RP 572, 598. Defense counsel declined. Had the court sustained the contemporaneous objection, an instruction to disregard would have been effective to quell any speculation as to the reasons for counsel's absence. But revisiting the issue after the court had overruled the objection and further evidence had been presented ran the risk of highlighting the

prejudicial testimony. 8RP 596, 599-600; see State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (recognizing that decision not to seek instruction limiting use of damaging evidence can be legitimate tactical choice).

There is a substantial likelihood that the prosecutor's misconduct prejudiced the defense. Hutchinson's defense rested on challenging the credibility of the prosecution witnesses, and the closing argument focused on inconsistencies in various statements made by these witnesses. See 14RP 1453-54, 1459, 1480. The prosecutor's deliberate introduction of irrelevant facts likely had the intended effect of convincing the jury to disregard any impeachment relating to the defense interview and look with suspicion on the defense argument. The improper tactics designed to disparage defense counsel's integrity severely damaged Hutchinson's opportunity to present his case before the jury.

b. The prosecutor misstated the law regarding accomplice liability during closing argument.

Hutchinson was charged with promoting the commercial sexual abuse of CB. The evidence at trial was that Young talked to CB about committing acts of prostitution, Young communicated with her by text message about prostitution, Young took CB's photographs and created the Backpage.com ad to solicit customers, and CB gave all the money she

earned from prostitution to Young. 6RP 270, 275, 277, 283-86, 313, 326, 331. Hutchinson was present with Young during many of these events, but CB testified she had no communications with Hutchinson regarding prostitution. 6RP 316, 326. Although there was evidence that Hutchinson rented a motel room, it was the room he and Young stayed in, not the room used by CB for prostitution. 6RP 316, 11RP 1074. Thus, the State's case against Hutchinson on this charge depended on the jury finding accomplice liability.

The law regarding accomplice liability is well settled. A person is an accomplice of another person in the commission of a crime if: "[w]ith knowledge that it will promote or facilitate the commission of the crime, he or she . . . [s]olicits, commands, encourages, or requests such other person to commit it; or . . . [a]ids or agrees to aid such other person in planning or committing it[.]" RCW 9A.08.020(3). Mere knowledge or presence of the defendant is not sufficient to establish accomplice liability. State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981); In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). Even if accompanied by knowledge that one's presence will aid in the commission of the crime, a person will not be subject to accomplice liability unless the person is also "ready to assist" in the commission of the crime. Rotunno, 95 Wn.2d at 933.

Despite this well settled law, the prosecutor informed the jury in closing argument that "mere presence is sufficient for accomplice liability." 14RP 1439-40. Even after the court suggested to the prosecutor that he had misspoken, the prosecutor repeated that mere presence was enough. 14RP 1440.

A prosecutor's argument to the jury must be confined to the law stated in the trial court's instructions. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). It is misconduct for a prosecutor, with all the weight of the office behind him, to misstate the applicable law when arguing the case to the jury. Such misstatement of the law carries the grave potential to mislead the jury. Davenport, 100 Wn.2d at 762, 764.

The prosecutor was arguing about Young's complicity in the charged rape when he made these erroneous statements, and the court initially sustained Young's objections. 14RP 1439-40. The prosecutor responded that "By his presence he's giving the stamp of approval to what is occurring here." 14RP 1440. Hutchinson's counsel joined the objection, but at that point the court overruled and told the prosecutor to proceed. 14RP 1440.

Because Hutchinson objected to the prosecutor's improper argument, his conviction should be reversed if the prosecutor's misconduct "resulted in prejudice that had a substantial likelihood of

affecting the jury's verdict." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (citing State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009) (citing Reed, 102 Wn.2d at 145)).

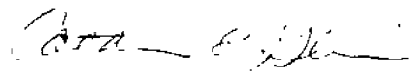
Although the prosecutor was specifically referring to Young and the rape charge when he made the offending argument, the State's case against Hutchinson on the promoting charge relied equally on accomplice liability. The State had to convince the jury that, even though Hutchinson did not talk to CB about prostitution, did not post the ad, and did not receive any money, he was also guilty. The prosecutor's attempt to redefine accomplice liability to include mere presence with knowledge, together with the court's inconsistent rulings on the objections to those arguments, likely misled the jury. There is a substantial likelihood this prejudicial misconduct affected the verdict, and Hutchinson's conviction for promoting must be reversed.

D. CONCLUSION

The State failed to present sufficient evidence that Hutchinson was guilty of communicating with a minor for immoral purposes, and that conviction must be reversed and the charge dismissed. In addition, prosecutorial misconduct in examining a witness and closing argument denied Hutchinson a fair trial, and the promoting charge must be reversed as well.

DATED November 14, 2014.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

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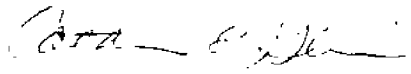

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